



1 to the guards' office. Once there, an officer called for assistance,  
2 and ultimately, Plaintiff was transported to a hospital in Phoenix.  
3 Plaintiff suffered multiple injuries.

4 Plaintiff alleges four claims against the United States: I)  
5 negligence; II) assault; III) negligence per se; and IV) slip and  
6 fall. The core of Plaintiff's claims is that Defendant breached its  
7 duty to maintain a reasonably safe living area for Plaintiff, to have  
8 adequate staff supervising the area to prevent inmates from obtaining  
9 dangerous weapons, and to maintain emergency duress alarms in areas  
10 where supervision is impossible. Plaintiff also alleges that the  
11 possibility of an unprovoked assault was known to Defendant's agents  
12 and that Defendant took no precautionary measures to prevent such an  
13 event. Plaintiff states that Defendant's correctional service manual  
14 obligates Defendant to have officers supervising the area, and the  
15 failure to do so results in negligence per se.

16 On January 22, 1999, the Court denied Defendant's prior Motion  
17 for Summary Judgment without prejudice. (See Doc. No. 24). The  
18 Court determined that it could not address whether Defendant was  
19 negligent until it first determined whether it had subject matter  
20 jurisdiction to entertain the claim under the FTCA. The Court  
21 ordered Defendant to file a motion addressing whether the  
22 discretionary function exception to the FTCA bars this claim against  
23 the United States for lack of jurisdiction. Plaintiff responded to  
24 the Court's order by filing two duplicative motions asking the Court  
25 to grant subject matter jurisdiction under the FTCA. (Doc. Nos. 25,  
26 28). Defendant filed a motion for summary judgment on February 18,  
27 1999, arguing that the discretionary function exception precludes  
28 Plaintiff's claim. (Doc. No. 26). Plaintiff responded on April 7,

1 1999, (Doc. No. 34), and Defendant filed a reply on April 21. (Doc.  
2 No. 35).

### 3 DISCUSSION

#### 4 A. LEGAL STANDARD FOR SUMMARY JUDGMENT

5 A court must grant summary judgment if the pleadings and  
6 supporting documents, viewed in the light most favorable to the  
7 non-moving party, "show that there is no genuine issue as to any  
8 material fact and that the moving party is entitled to judgment as a  
9 matter of law." Fed.R.Civ.P. 56(c) (1996); see also Celotex Corp. v.  
10 Catrett, 477 U.S. 317, 322-23 (1986); Jessinger v. Nevada Fed. Credit  
11 Union, 24 F.3d 1127, 1130 (9th Cir. 1994). Substantive law  
12 determines which facts are material. Anderson v. Liberty Lobby, 477  
13 U.S. 242, 248 (1986); Jessinger, 24 F.3d at 1130. In addition,  
14 "[o]nly those disputes over facts that might affect the outcome of  
15 the suit under the governing law will properly preclude the entry of  
16 summary judgment." Anderson, 477 U.S. at 248. The dispute must be  
17 genuine, that is, "the evidence is such that a reasonable jury could  
18 return a verdict for the nonmoving party." Id.; see also Jessinger,  
19 24 F.3d at 1130.

20 A principal purpose of summary judgment is "to isolate and  
21 dispose of factually unsupported claims." Celotex, 477 U.S. at  
22 323-24. Summary judgment is appropriate against a party who "fails  
23 to make a showing sufficient to establish existence of an element  
24 essential to that party's case, and on which that party will bear the  
25 burden of proof at trial." Id. at 322; see also Citadel Holding  
26 Corp. v. Roven, 26 F.3d 960, 964 (9th Cir. 1994). The moving party  
27 need not disprove matters on which the opponent has the burden of  
28 proof at trial. Celotex, 477 U.S. at 323.

1 Furthermore, the party opposing summary judgment "may not rest  
2 upon the mere allegations or denials of [the party's] pleadings, but  
3 . . . must set forth specific facts showing that there is a genuine  
4 issue for trial." Fed. R. Civ. P. 56(e); see also Celotex, 477 U.S.  
5 at 324; Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574,  
6 585-88 (1986); Brinson v. Lind Rose Joint Venture, 53 F.3d 1044, 1049  
7 (9th Cir. 1995). There is no issue for trial unless there is  
8 sufficient evidence favoring the non-moving party. If the evidence  
9 is merely colorable or is not significantly probative, summary  
10 judgment may be granted. Anderson, 477 U.S. at 249-50. However,  
11 "[t]he evidence of the non-movant is to be believed and all  
12 justifiable inferences are to be drawn in his favor." Id. at 255  
13 (citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-59 (1970)).

#### 14 **B. ANALYSIS**

##### 15 1. FTCA Claim

16 Under the Federal Tort Claims Act ("FTCA"), Congress authorized  
17 suits against the United States for money damages "for injury or loss  
18 of property, or personal injury or death caused by the negligent or  
19 wrongful act or omission of any employee of the Government while  
20 acting within the scope of his office or employment, under  
21 circumstances where the United States, if a private person, would be  
22 liable . . . ." 28 U.S.C. § 1346(b). However, "[w]hile the FTCA on  
23 its face is a ~~broad~~ waiver' of sovereign immunity that provides for  
24 governmental liability commensurate with that of private parties, its  
25 waiver of immunity is far from absolute." Calderon v. United States,  
26 123 F.3d 947, 948 (7th Cir. 1997). For example, the FTCA does not  
27 waive immunity when a claim is "based upon the exercise or  
28 performance or the failure to exercise or perform a discretionary

1 function or duty on the part of a federal agency or an employee of  
2 the Government, whether or not the discretion involved be abused."  
3 28 U.S.C. § 2680(a). "This discretionary function exception to the  
4 FTCA «marks the boundary between Congress' willingness to impose tort  
5 liability upon the United States and its desire to protect certain  
6 governmental activities from exposure to suit by private  
7 individuals.'" Dykstra v. United States Bureau of Prisons, 140 F.3d  
8 791, 795 (8th Cir. 1998)(quoting United States v. S.A. Empresa de  
9 Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 808  
10 (1984)). Congress believed that imposing liability on the government  
11 for its employees' discretionary acts "would seriously handicap  
12 efficient governmental operations." Varig Airlines, 467 U.S. at 814.  
13 Therefore, the purpose of the discretionary function exception is to  
14 "prevent judicial «second-guessing' of legislative and administrative  
15 decisions grounded in social, economic, and political policy through  
16 the medium of an action in tort." United States v. Gaubert, 499 U.S.  
17 315, 323 (1991). "To the extent an alleged act falls within the  
18 discretionary function exception, a court lacks subject matter  
19 jurisdiction." Dykstra, 140 F.3d at 795; see also Cohen v. United  
20 States, 151 F.3d 1338, 1340 (11th Cir. 1998).

21 The Supreme Court applies a two-part test to determine whether  
22 an act is discretionary and falls within the discretionary function  
23 exception to the FTCA. See Berkovitz v. United States, 486 U.S. 531,  
24 536-37 (1988). First, the exception bars claims based on decisions  
25 made at the policy or planning level. This includes claims based on  
26 "day-to-day management decisions if those decisions require judgment  
27 as to which range of permissible courses is wisest." Fazi v. United  
28 States, 935 F.2d 535, 538 (2d Cir. 1991) (citing Gaubert, 499 U.S.

1 315). Second, even when an element of judgment or choice is  
2 involved, the judgment must be based on considerations of public  
3 policy. Gaubert, 499 U.S. at 323.

4 Here, the Court finds that Plaintiff's claim is barred by the  
5 discretionary function exception to the FTCA. Decisions by  
6 governmental officials as to the day-to-day security needs of a  
7 prison, including the number of guards to employ to supervise a given  
8 area, where to place emergency alarms, and tactical choices made  
9 surrounding the movement of inmates within the institutions are  
10 judgment calls and choices based on policy determinations that seek  
11 to accommodate "safety [goals] and the reality of finite agency  
12 resources." See Varig Airlines, 467 U.S. at 820. As such, they fall  
13 within the realm of discretionary governmental decisions that  
14 Congress intended to protect from exposure to suit by private  
15 individuals. Id. at 808. Judges should not "freely substitute their  
16 judgment for that of [prison] officials who have made a considered  
17 choice." Whitley v. Albers, 475 U.S. 312, 321 (1986). See also  
18 Cohen v. United States, 151 F.3d 1338, 1345 (11th Cir. 1998)  
19 (discretionary function exception precludes suit based on allegedly  
20 improper decisions in classifying prisoners and placing them in  
21 institutions, even if result is one inmate attacking another inmate);  
22 Calderon v. United States, 123 F.3d 947 (7th Cir. 1997)  
23 (discretionary function exception precludes FTCA claim by federal  
24 prison inmate injured in assault by another inmate). "Balancing the  
25 need to provide inmate security with the rights of the inmates to  
26 circulate and socialize within the prison involves considerations  
27 based upon public policy." Calderon, 123 F.3d at 951 (citing Bell v.  
28 Wolfish, 441 U.S. 520, 547-48 (1979) (holding that prison

1 administrators should be afforded wide-ranging deference in  
2 implementing and executing policies because discretion is needed to  
3 preserve internal discipline and maintain institutional security)).

4 Plaintiff argues that Defendant's decisions did not involve an  
5 element of judgment or choice because officials have no discretion to  
6 not follow security rules. Plaintiff argues that he was attacked by  
7 inmates who were "out of bounds" and that the security officers  
8 should not have allowed the other inmates to enter Plaintiff's  
9 housing unit. But as the Court discussed above, day-to-day security  
10 considerations, including rules about who can and cannot enter a  
11 housing unit, are precisely the type of policy decisions that are  
12 within the discretion of Defendant. Because the Court finds that the  
13 decisions involved here were discretionary and that the discretion  
14 was grounded in public policy considerations, the discretionary  
15 function exception to the FTCA protects Defendant from suit, even if  
16 Defendant abused its discretion or was negligent in the performance  
17 of its discretionary function. See Calderon, 123 F.3d at 951.  
18 Accordingly, because the Court is without subject matter jurisdiction  
19 in this case, the Court will dismiss Plaintiff's claim.

## 20 2. Other Pending Motions

### 21 a. Plaintiff's Motions to Grant Subject Matter Jurisdiction

22 On February 22, 1999, and March 3, 1999, Plaintiff filed motions  
23 entitled "Motion to Grant Subject Matter Jurisdiction." (Doc. Nos.  
24 25, 28, respectively). After reviewing both motions, the Court finds  
25 that Document Number 28 is duplicative of Document Number 25 and will  
26 be denied as such. The Court further finds that in light of the  
27 Court's ruling that it lacks subject matter jurisdiction under the  
28 discretionary function of the FTCA, the Court will deny Plaintiff's

1 motion (Doc. No. 25) as moot.

2 b. Defendant's Motion to Strike

3 On May 5, 1999, Plaintiff filed a document entitled "Response to  
4 the Government's Reply to Plaintiff's Response to Motion for Summary  
5 Judgment." (See Doc. No. 36). Defendant moved to strike Plaintiff's  
6 "further response" on May 13, 1999, on the ground that it is not in  
7 accordance with the federal or local rules. The Court agrees. The  
8 rules provide for a motion, a response, and a reply. Plaintiff did  
9 not and has not sought leave to file a response to a reply.  
10 Accordingly, the Court will grant Defendant's Motion to Strike and  
11 will direct the Clerk of Court to strike Document Number 36 from the  
12 record.

13 **CONCLUSION**

14 **IT IS THEREFORE ORDERED** that Defendant's Motion for Summary  
15 Judgment (Doc. No. 26) is granted. The Clerk of Court is directed to  
16 dismiss the complaint and action in its entirety and to enter  
17 judgment accordingly.

18 **IT IS FURTHER ORDERED** that Plaintiff's Motion to Grant Subject  
19 Matter Jurisdiction (Doc. No. 25) is denied as moot.

20 **IT IS FURTHER ORDERED** that Plaintiff's Motion to Grant Subject  
21 Matter Jurisdiction (Doc. No. 28) is denied as duplicative.

22 **IT IS FURTHER ORDERED** that Defendant's Motion to Strike  
23 Plaintiff's Further Response (Doc. No. 38) is granted. The Clerk of  
24 Court is directed to strike Document Number 36 from the record.

25  
26 **DATED** this \_\_\_\_ day of \_\_\_\_\_, 1999.  
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PAUL G. ROSENBLATT  
United States District Judge